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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

BERNARD JOSEPH ROSA, JR.,

Petitioner

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY, ET AL.,

Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Bernard J. Rosa, Jr.
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Sebastopol, CA 95472
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QUESTION PRESENTED

The United States Court of Appeals for the Ninth Circuit upheld the decision of the United States District Court for the Northern District of California to dismiss Appellant's Complaint upon Motion by the California State Attorney General pursuant to Federal Rule of Civil Procedure 12(b)(6). The decision was based upon three contentions: 1) that Appellant's claims were barred by the doctrine of sovereign immunity; 2) that Appellant's claims were barred by the statute of limitations as the nucleus of his claim arose in 1993 in the form of a stipulation for probation in connection with a license to practice public accounting; and 3) that at the time of dismissal, Appellant was litigating a parallel state claim and consequently the United States District Court was barred from intervening under the doctrine set forth in Younger v. Harris. Appellant's contentions in response were: 1) that his claims as to the individual actors named in the lawsuit fell outside the scope of sovereign immunity; 2) that the doctrine of equitable tolling applies because the California State Board of Accountancy continued to rely upon the same fraudulently acquired document as late as 2003 to deny Petitioner reinstatement as a certified public accountant; and 3) that at the time Appellant's federal suit had progressed to the Court of Appeals, his state action had been dismissed leaving the field free for the

federal action to commence without application of the Younger "Doctrine."

The question presented is whether it was error to not remand Appellant's matter back to the United States District Court with instructions to grant leave to amend in the face of facts showing individual liability beyond the scope of sovereign immunity, despite application of equitable tolling of the statute(s) of limitations, and because the State of California's defense under Younger was then moot at the time the matter was heard on appeal.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties to the proceeding below are as follows: the State of California, California Board of Accountancy; Carol Sigmann; Gregory P. Newington, Lawrence Knapp, Bill Lockyer, Joel Prime, Ronald Diedrich, Michael R. Granen, and Stephen J. Smith. All individual parties are sued in the proceeding below as agents of each other and of the State of California, California Board of Accountancy, and as individual defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bernard Joseph Rosa, Jr. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals' unpublished opinion is reported electronically at Rosa v. California, 2007 U.S. App. LEXIS 29157 and is also attached as Appendix A to the present petition. The opinion of the United States District Court for the Eastern District of California is unpublished but is available electronically at Rosa v. California, 2005 U.S. Dist. LEXIS 42411 (E.D. Cal., Aug. 5, 2005), and is also attached as Appendix B to the present petition.

JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to properly review the decision of the District Court pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion denying Petitioner's appeal on 12 December 2007. Petitioner filed a timely Petition for Panel Rehearing pursuant to

Federal Rule of Appellate Procedure 40. Said Petition for Panel Rehearing was denied on 18 January 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 of the United States Code, at Section 1983 provides, in pertinent part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Title 42 of the United States Code, at Section 1985 provides, in pertinent part, that:

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire...to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Finally, Title 42 of the United States Code, at Section 1986 states, in pertinent part:

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented;

and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...

STATEMENT

This matter concerns over a decade of effort by Petitioner to regain his license to practice public accounting in the State of California. Plaintiff received his C.P.A. license in 1969 and practiced public accounting in California (and, at times, in Utah) without incident until 1993 when he became the subject of disciplinary action before the California State Board of Accountancy.

In November 1993, Petitioner entered into an oral stipulation with the State Board of Accountancy to resolve the pending disciplinary action. Petitioner alleges that the State Board of Accountancy, through its representative Joel Prime, negotiated the finer points of the stipulation and agreed that references to "fraud, dishonesty, and gross negligence" would be removed. In reliance upon this representation, Petitioner signed a blank stipulation and faxed it to Mr. Prime. In April 1994, Petitioner received the modified stipulation with his signature attached. In continued reliance upon the representations of Mr. Prime, Petitioner did not review the stipulation until November 1994, when he realized that contrary to Mr.

Prime's representations (upon which Petitioner had relied in tendering his signature), the agreed-upon changes had not been integrated into the final draft. At a probation hearing shortly after November 1994, Petitioner attempted to rectify this issue on the record but was silenced by the Board of Accountancy members who had convened for said probation hearing. At that point, this and other financial difficulties caused Petitioner to become disillusioned and he withdrew from the practice of public accounting, experiencing a number of personal and professional crises.

In late 1999, Petitioner attempted to regain licensure as a public accountant in California. In October 1999, the State Board of Accountancy denied his Petition for reinstatement on the basis of the stipulation that is in contention in the proceedings below. Plaintiff again petitioned the State Board of Accountancy for reinstatement in 2001, 2002, 2003 and 2004. Each of these petitions was denied. On 10 May 2004, Petitioner initiated the proceeding below before the United States District Court for the Eastern District of California. The State Board of Accountancy moved to dismiss Petitioner's lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner responded by filing a First Amended Complaint, which resulted in the Board withdrawing its first 12(b)(6) motion but filing a new one in response to the First Amended Complaint. The District Court granted the Board's decision and dismissed the First

Amended Complaint on the basis that the 1) that Appellant's claims were barred by the doctrine of sovereign immunity; and 2) that at the time of dismissal, Appellant was litigating a parallel state claim (a writ of administrative mandamus proceeding) and consequently the United States District Court was barred from intervening under the doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971).

Petitioner has challenged the Board of Accountancy's ongoing reliance upon a stipulation obtained by fraud. The ongoing reliance upon that stipulation as late as 2003 provided the basis for initiating suit in 2004. The Board and individual defendants have argued in the proceedings below that Petitioner's claims are time-barred and he should have brought suit back in 1994 when he first discovered the alleged fraud. However, both lower courts failed to acknowledge the ongoing violation precipitated by the Board's continued reliance upon the stipulation in question. While Petitioner challenged this misconduct in state court, he failed. During the pendency of Petitioner's appeal in the federal proceeding, the state matter was resolved against Petitioner. By the time the federal matter reached the Court of Appeals for the Ninth Circuit, there was no state law action for the Younger Doctrine to apply to. Furthermore, both lower courts failed to consider the individual liability of the defendants when broadly applying principles of sovereign and prosecutorial immunity. Neither

principal applies when 1) the individual action is challenged; and 2) said individual action is motivated by fraud or other improper impetus. See Roe v. State of California (2001) 113 Cal. Rptr. 2d 900. Accordingly, liability under 28 U.S.C. § § 1983, 1985, and 1986 apply to prohibit the conduct in question as unlawful.

Certiorari is warranted to explore the issue of whether the lower courts were justified in denying Petitioner further leave to amend in light of the fact that immunity does not extend to the individual bad acts of those parties named as individual defendants to the suit. Further review via certiorari is warranted on the basis that the Court of Appeals erred in holding that the Younger abstention doctrine barred federal court intervention even after the parallel state proceedings had been dismissed.

BASIS FOR GRANTING THE PETITION

First, the decision of the lower courts in refusing to consider principles of exemption to the doctrines of prosecutorial and sovereign immunity essentially deprives Petitioner of his rights to due process in seeking/reacquiring the property right associated with a license to practice public accounting.

Second, the decision of the lower courts in refusing to apply principles of equitable tolling to render Petitioner's claims against the defendants in

the proceedings below as timely is a further error. The reasoning that a fraudulently acquired instrumentality may be used as a basis for actionable wrongdoing time and time again but challenges to that use are barred because the instrumentality came about beyond the statute of limitations renders the entire application of equitable tolling meaningless in the face of overwhelming appellate guidance suggesting its application for those very purposes.

Third, and perhaps most importantly, there is a gap in appellate guidance providing for treatment of claims brought in federal court while state law claims are pending but resolved while federal decisions are decided on appeal. As a matter of procedure, the question could be posed as follows: If A sues B in federal court and state court and the state court matter is later resolved while dismissal under the Younger preemption doctrine is challenged at the appellate level, can such a dismissal be overturned and the federal matter allowed to proceed in light of the mootness of a Younger defense? Clarification of when Younger applies and does not apply as the existence of a state action barring federal intervention dissipates is very much needed.

I. THE DECISION BELOW FAILS TO PROPERLY CONSIDER THE LIMITS TO SOVEREIGN AND PROSECUTORIAL IMMUNITY.

The California State Board of Accountancy obtained a consent degree from Petitioner on the basis of fraud and exported Petitioner's signature from a blank form to an agreement revised without Petitioner's knowledge or consent. The Board's ongoing denials of reinstatement in relation to this fraudulently obtained consent degree, after Petitioner has complied with all of its terms, implicates a breach of agreement/contract. This in turn violates Petitioner's civil rights to practice his profession and earn a livelihood doing so.

Although immunity extends to those in prosecutorial positions carrying out functions relating to the prosecutorial exercise, that immunity does not extent to the fraudulent procurement of such agreements, nor does it extend to the breach of such agreements. See Roe v. State of California, supra. The pleadings in the lower court indicate that a contract claim exists. Rather than granting Petitioner additional leave to amend his Complaint, the lower court dismissed the action outright. The named individual Defendants in this matter were state actors, acting under color of state law. As such, they are subject to liability under 42 U.S.C. § 1983 and the related statutes as pled in the lower court. See 42 U.S.C. § 1983 (Lexis 2007). Notwithstanding the immunity granted to the institutional Defendants, individual actors are not categorically subject to such

immunity.

The lower court failed to distinguish litigation activity from a tortious breach of contract which is not immunized. In 1993, after protracted negotiations, over the phone, the Parties, Joel Primes, for the AG's office, the Board and the Plaintiff reached an oral agreement that would reflect the agreement by the parties, namely, that any and all references to FRAUD, DISHONESTY AND GROSS NEGLIGENCE, WOULD BE REMOVED From the agreement. Petitioner, at the behest of AG signed in blank, the signature page, faxed that signed page, with the assurance of the Attorney General's Deputy that the written stipulation, as orally agreed to would reflect the oral agreement by the parties, namely, that any and all references to FRAUD, DISHONESTY AND GROSS NEGLIGENCE, WOULD BE REMOVED From the agreement. However, when petitioner's signature page was attached to the rest of the written stipulation in Sacramento, the document did not match what the parties agreed to. This agreement was made on December 23, 1993 and was to be reduced to writing and presented within weeks, after the seasons holidays, to the Plaintiff. Defendant Joel Primes encouraged Plaintiff, after discussions with the Board to sign a blank signature page and fax it to his office to be matched with the final written documents. Plaintiff refused to do so at first, but after much encouragement and intimidation by the defendant Plaintiff agreed based on the fact that

certainly the Attorney General would keep his word, and the final stipulation would reflect the parties oral agreement. Defendant's mailed the "stipulation" to Plaintiff in April, 1994 two weeks before a meeting with the Board to confirm the terms of probation, which was part of the agreement. This unfortunate arrangement formed the basis over several denials for reinstatement in the ten years that follows. That the lower court could not discern a tortious breach of contract in this matter is surprising.

II. THE DECISIONS BELOW FAILED TO GIVE THE REQUIRED CONSIDERATION OF WHETHER SUBSEQUENT MISUSES OF AN INSTRUMENTALITY PROMULGATED OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS PERMITS APPLICATION OF EQUITABLE TOLLING PRINCIPLES.

Petitioner contends that each Defendant named in the proceedings below participated to some extent in the fraudulent procurement of a consent decree arising out of disciplinary action taken by the California State Board of Accountancy. This false document was created in 1994 but has been the basis of the Board's continual denial of reinstatement, up to and including March 2004, mere months before the present action was filed. The courts in the proceedings below failed to properly consider the course of conduct that was

ongoing from 1993 through 2004 in determining whether principles of equitable tolling should be applied.

A statute of limitations may be tolled on equitable principles under circumstances when a defendant's conduct is part of a continuing practice where the most recent act evidencing the continuing practice falls within the limitations period. Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997); Buchholz, et al. v. Midwestern Intermediate Unit IV, et al., 128 Fed.Appx. 890 (3d Cir. 2005). In the specific context of challenges to allegedly retaliatory conduct, the continuing violation "doctrine" is appropriately applied upon a showing of a continuing course of conduct evidencing such conduct. Yanowitz v. L'oreal, 116 P.3d 1123 (2005); Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507–1508 (10th Cir. 1997) (holding that an adverse employment action occurred when an employee was required to "go through several hoops" in order to obtain severance benefits).

The facts pled in the proceedings below establish a pattern of denials of Petitioner's requests for reinstatement of his license to practice public accounting. All of these denials were in spite of Petitioner's ongoing efforts to comply with the letter of the original 1993 consent degree. Similarly, the Board's refusal to reinstate was also based upon reference to the provisions of that same decree evidencing alleged fraudulent conduct by Petitioner,

which Petitioner contends should have been removed from degree based on a verbal agreement with Joel Prime. In October of 1999 Petitioner's Petition for Reinstatement (PR) was denied by the board and Defendants, again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but they continued to use the failed contract, i.e., the false document, as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. In March of 2001 Petitioner's PR was again denied by the board and they again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but Defendants, continued to use the failed contract as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. In July 2002 Petitioner's PR was again denied by the board and they again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but Defendants, continued to use the failed contract as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. The Board again refused the Petitioner's petition in a similar manner as in three preceding paragraphs above, in the years 2003 and lastly March of 2004. Also again, Defendants refused to hear the Petitioner's side of why he would enter into an agreement to settle a matter, and still maintain no

fault from the accusations, which accusations were not agreed to. Nor would they even allow information about how the failed contract was contrived at with Petitioner's wrongfully obtained signature, but Defendants, continued to use the failed contract, i.e., the false document, as a basis for denial.

The courts in the proceedings below failed to take into account the essential consideration that the conduct of the Board was motivated not out public interest, but instead were retaliatory against Petition because of the 1) his unwillingness to admit to a wrong not committed; and 2) for the past acrimony between the parties. As such, they are appropriately analyzed within the context of the continuing violation doctrine. The courts in the proceedings below refused to consider such an argument. Indeed, the Ninth Circuit Court of Appeal's Memorandum Decision of 12 December 2007 completely overlooks the arguments set forth in both written and oral argument.

III. THE YOUNGER DOCTRINE WAS IMPROPERLY APPLIED BY THE COURT BELOW BECAUSE NO CONFLICTING STATE ACTION EXISTED AT THE TIME THE MATTER WAS CONSIDERED ON APPEAL.

The Ninth Circuit analyzed the actionability of Petitioner's federal claims in light of a moot point: that

Petitioner had at one time asserted a state law proceeding. Under Younger v. Harris, supra, federal courts are admittedly barred from interfering with state proceedings. However, a gap in precedent exists with respect to the question of whether Younger should apply where the conflicting state proceeding is resolved while the dismissal of the federal case is challenged.

The Younger "Doctrine" is intended to protect state civil proceedings. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432-34 (1982). Younger applies where there are administrative remedies that must be exhausted before "coercive" federal proceedings are initiated. O'Neill v. City of Philadelphia, 32 F.3d 785, 791 (3d Cir. 1994). However, where there are no state proceedings to protect, the application of the Younger doctrine is improper. Agriesti v. MGM Grand Hotels, 53 F.3d 1000, 1001 (9th Cir. 1995). If state proceedings were once pending but are pending no longer, Younger should only apply as a temporary stay to be lifted upon conclusion of said state proceedings. Gilbertson v. Albright, 381 F.3d 965, 969 (9th Cir. 2004); Voychuk v. California, 2006 U.S. Dist. LEXIS 11888, **7-8 (E.D. Cal. 2006).

The Court of Appeals erred by not properly considering the pendency of state proceedings on appeal in light of the applicable de novo standard of review. The decision of the District Court was excessive in terms of an alternative to dismissal

existing under Younger and its progeny: a temporary stay of federal proceedings pending the resolution of the conflicting state action. See Gibertson, supra. In light of these factors, the appropriate course of action would have been for the Court of Appeals to recognize the procedural status of the conflicting state action at the time of its de novo review (i.e., that it was no longer pending), and remand the matter to the District Court accordingly with instructions to permit Petitioner leave to amend his Complaint further. For the Court of Appeals to uphold such a dismissal in light of authority that provides for a stay is sufficient grounds for reversal. The gap in guidance concerning the resolution of a conflicting state matter while an appeal is taken of a dismissal of the federal matter on (among other bases, Younger exemption), renders the present petition overwhelmingly appropriate.

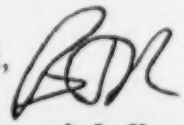
CONCLUSION

Petitioner has struggled to regain the key to his livelihood as a public accountant for more than ten years. His challenge to the California State Board of Accountancy has encountered myriad stumbling blocks but the most critical of these are the decisions in the Courts below. The continuing violation doctrine should be applied to render the Boards decisions as late as 2004 actionable. The matter of immunity is appropriately left to be resolved upon remand and the

the application of Younger principles is appropriate for further guidance by this Court to determine with greater clarity whether a matter is appropriately remanded where any conflicting state proceedings are resolved while a federal appeal is pending.

For the foregoing reasons, it is respectfully submitted that the present petition for a writ of certiorari be granted.

Respectfully Submitted,



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12 April 2008

BERNARD JOSEPH ROSA, JR., Plaintiff - Appellant, v. STATE OF CALIFORNIA, a Government Entity; CALIFORNIA BOARD OF ACCOUNTANCY; CAROL SIGMANN, an individual and in her capacity as agent and employee of the CBA; GREGORY P. NEWINGTON, an individual and in his capacity as agent and employee of the CBA; LAWRENCE KNAPP, an individual and in his capacity as agent and employee of the CBA; EDMUND G. BROWN JR., ** Attorney General of California; JOEL PRIME, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney general; RONALD DEIDRICH, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney; MICHAEL R. GRANEN, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney; STEPHEN J. SMITH, Administrative Law Judge, Defendants - Appellees.

** Edmund G. Brown Jr. is substituted for his predecessor, Bill Lockyer, as Attorney General of California, pursuant to Fed. R. App. P. 43(c)(2).

No. 05-16783

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

2007 U.S. App. LEXIS 29157

October 17, 2007, Argued and Submitted, San Francisco, California
December 12, 2007, Filed

Bernard Joseph Rosa, Jr. appeals the dismissal of his claims against defendants, the State of California, the California Board of Accountancy (CBA), three agents of the CBA (Carol Sigmann, Gregory P. Newington, and Lawrence Knapp), the California Attorney General (AG), three deputy AGs (Joel Prime, Ronald Deidrich, and Michael Granen), and Administrative Law Judge (ALJ) Stephen Smith. The federal district court dismissed Rosa's claims for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). HN1"Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." Vasquez v. Los Angeles County, 487 F.3d 1246, 1258 (9th Cir. 2007). We review the district court's dismissal de novo and affirm the district court.

The district court dismissed Rosa's claims against the State of California and the CBA on the ground that the claims [*3] were barred by sovereign immunity.

HN2The Eleventh Amendment gives California immunity from suits brought by its citizens in federal court unless California waives that immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). This immunity extends to state agencies. In re Harleston, 331 F.3d 699, 701 (9th Cir. 2003). The record contains no evidence that California or the CBA waived immunity. Accordingly, we conclude the district court properly dismissed Rosa's claims against the State of California and the CBA.

The district court dismissed Rosa's claims against then California AG Bill Lockyer and deputy AGs Joel Prime, Ronald Deidrich, and Michael Granen on the ground that the claims were barred by the applicable statute of limitations. HN3Parties have one year to commence claims brought under 42 U.S.C. § 1986, and California's statute of limitations for personal injury actions (one year at the time of the alleged violations) governs claims brought pursuant to 42 U.S.C. § 1983 and § 1985. 42 U.S.C. § 1986 (2003); Canatella v. Van De Kamp, 486 F.3d 1128, 1132-33 (9th Cir. 2007); Taylor v. Regents of University of California, 993 F.2d 710, 711-12 (9th Cir. 1993).

Rosa alleged [*4] the AG and his agents acted wrongfully as late as 1994. Rosa did not file this action against the AG and his agents until 2004, well beyond

the one-year time limit set forth by California's personal injury statute of limitations and by 42 U.S.C. § 1986. Thus, we conclude the district court properly dismissed Rosa's claims against the California AG and his agents. See id.

The district court additionally found Rosa's claims against the AG, the AG's agents, the CBA's agents, and the ALJ Stephen Smith were barred by prosecutorial and judicial immunity. HN4Prosecutors performing in their official functions are entitled to absolute immunity, and officials, such as agency officials, who act as judges or prosecutors in a court-like setting are considered "quasi-judicial" and are entitled to immunity. See Butz v. Economou, 438 U.S. 478, 511-12, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978); Milstein v. Cooley, 257 F.3d 1004, 1007-08 (9th Cir. 2001); Romano v. Bible, 169 F.3d 1182, 1186 (9th Cir. 1999).

Here, the district court found the CBA's agents, the AG, the AG's agents, and the ALJ were acting in a judicial, prosecutorial, or quasi-judicial manner and accordingly were entitled to absolute immunity. We conclude that the district [*5] court properly found the defendants were entitled to immunity and properly dismissed the claims for damages against them.

The district court dismissed Rosa's equitable claim for

relief on the ground that it was barred by the Younger abstention doctrine. We conclude the district court properly applied the Younger abstention doctrine to Rosa's equitable claim because state proceedings were ongoing, implicated an important state interest, and provided an adequate opportunity to litigate federal claims. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982); Gilbertson v. Albright, 381 F.3d 965, 973 (9th Cir. 2004).

Finally, the district court dismissed Rosa's state law claims pursuant to HN528 U.S.C. § 1367(c)(3), which allows a district court to decline to exercise supplemental jurisdiction over state law claims when all of the federal claims have been dismissed. As discussed above, the district court properly dismissed all of Rosa's federal claims. Accordingly, we conclude the district court properly dismissed Rosa's state law claims pursuant to 28 U.S.C. § 1367(c)(3).

For [*6] the reasons discussed above, we AFFIRM the district court's order dismissing Rosa's claims.

AFFIRMED.

BERNARD JOSEPH ROSA, JR., Plaintiff, v. STATE OF CALIFORNIA, CALIFORNIA BOARD OF ACCOUNTANCY, CAROL SIGMANN, GREGORY P. NEWINGTON, LAWRENCE KNAPP, BILL LOCKYER, JOEL PRIME, RONALD DEIDRICH, MICHAEL R. GRANEN, and STEPHEN J. SMITH, Defendants.

NO. CIV. S-04-945 WBS PAN

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 42411

August 5, 2005, Decided

August 8, 2005, Filed

MEMORANDUM AND ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS

Plaintiff, a pro se [*2] litigant, brings claims against the State of California; the California Board of Accountancy ("CBA"); Carol Sigmann, Gregory P. Newington, and Lawrence Knapp as individuals and as agents and employees of the CBA; Bill Lockyer as Attorney General of California; Stephen J. Smith as Administrative Law Judge; and Joel Prime, Ronald Deidrich, and Michael R. Granen as individuals and as

agents and employees of the California Attorney General. Plaintiff alleges violations of 42 U.S.C. §§ 1983, 1985, and 1986; violations of the California Constitution; California Government Code § 1222; California Business and Professions Code § 6068; California Civil Code § 52.1; intentional infliction of emotional distress; negligent infliction of emotional distress; and defamation. He also asks for reinstatement of his Certified Public Accountant ("CPA") license, general damages in the amount of $ 2,000,000, punitive damages against each defendant in the amount of $ 1,500,000, costs of suit, and attorneys' fees.

Jurisdiction is predicated upon 28 U.S.C. §§ 1331 [*3] (federal question) and 1367 (supplemental jurisdiction). Plaintiff moves for summary judgment on all of his claims pursuant to Federal Rule of Civil Procedure 56. Defendants move to dismiss all plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Factual and Procedural Background 1

FOOTNOTES

1 Unless otherwise noted, all facts in this section are taken from plaintiff's First Amended Complaint.

Plaintiff received his CPA certificate in 1969. (First Am. Compl. P 7). In 1974, after working for several different employers, he became a sole practitioner providing professional accounting services. Around 1983, plaintiff developed what he refers to as a "tax strategy" to reduce and in some cases eliminate the self-employment tax. One of plaintiff's former clients complained to the CBA, and the CBA commenced an action against the plaintiff. (Id. P 7).

After the CBA commenced action against plaintiff, the Attorney [*4] General's Office and the CBA began negotiations designed to settle the action. (Id. P 8). Sometime in November 1993, plaintiff orally agreed to a stipulation presented by defendant Joel Primes, Supervising Deputy Attorney General. (Id. at 19 n.iv). The exact provisions of the stipulation are not explained by plaintiff. In December 1993, plaintiff reassessed his decision and refused to agree to the stipulation unless any and all references to "fraud, dishonesty, and gross negligence" were removed. (Id.) Plaintiff alleges that defendant Primes agreed to make the changes if plaintiff signed a blank signature page which Primes would later attach to the modified stipulation. When plaintiff expressed his reluctance to sign a blank signature page, Primes allegedly threatened to withdraw the offer to settle the case. (Id.

P 11). Plaintiff relented, signed the signature page, and faxed it to Primes. (Id. P 8).

In April 1994, plaintiff received the modified stipulation with his attached signature. (Id. P 12). He alleges that he assumed all the terms were correct, and did not become aware that the agreed-upon changes had not been made until he reviewed the stipulation [*5] sometime around November 1994. (Id. PP 9, 13). Plaintiff alleges that one of the defendants told him the matter would be resolved at a probation hearing. 2 At this probation hearing, plaintiff alleges that the judge "refused" to hear plaintiff's attempts to explain the situation with the stipulation. 3 (Id. P 15). In December 1995, plaintiff's CPA certificate was revoked. (Id. P 16).

FOOTNOTES

2 With the exception of Joel Primes, plaintiff does not explain the individual involvement of any of the named defendants in his complaint. He refers only to "defendant" and "defendants" without explaining to which defendant or defendants he is referring.

3 The court assumes for the purposes of these motions that the judge referred to in the complaint is defendant Stephen J. Smith, the Administrative Law Judge

named in plaintiff's complaint.

It appears that approximately four years passed before plaintiff decided to petition the CBA for reinstatement of his license. (See id. PP 16-19). In October 1999, [*6] this petition was denied by the CBA, which allegedly still relied at least in part on the disputed stipulation. The CBA allegedly stated that it was too late for any action and that plaintiff had not provided adequate proof of rehabilitation. (Id. P 19). Plaintiff's petition for reinstatement was again denied in March of 2001, July of 2002, sometime in 2003, and March of 2004. All of these denials were allegedly for the same reasons. (Id. PP 20-22).

On May 10, 2004, plaintiff filed a complaint and initiated the present lawsuit. The matter was referred to United States Magistrate Judge Peter A. Nowinski pursuant to 28 U.S.C. §§ 636, et seq., and Local Rule 72-302. Defendants responded to plaintiff's complaint on June 14, 2004 with a motion to dismiss, and an amended motion to dismiss on June 21, 2004. Plaintiff filed a first amended complaint ("FAC") on July 14, 2004, rendering the motion to dismiss moot. Without filing an answer, defendants renewed their motion to dismiss on August 9, 2004, and then filed an amended motion on August 10, 2004. On April 14, 2005, plaintiff

filed a motion for summary judgment.

The magistrate judge issued findings [*7] and recommendations recommending that defendants' motion to dismiss be granted and that plaintiff's motion for summary judgment be denied. (June 6, 2005 Magistrate Judge's Findings and Recommendations). On June 15, 2005, plaintiff filed objections to the findings and recommendations. On June 28, 2005, defendants filed a response to plaintiff's objections to the findings and recommendations. The court reviews both plaintiff's motion for summary judgment and defendants' motion to dismiss de novo. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); Local Rule 72-304. 4

FOOTNOTES

4 Plaintiff objects to defendants' response to his objections to the magistrate judge's findings and recommendations as untimely. (See Pl.'s Objections to Defs.' Untimely Response to Objections to Magistrate Judge's Findings & Recommendations at 1-2). However, this objection is moot because the court need not rely on any of the arguments in the defendants' response to decide the motions before it, which it reviews de novo.

[*8] II. Discussion

A. Plaintiff's Motion for Summary Judgment

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The nonmoving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Plaintiff essentially makes two [*9] arguments: First, defendants' motion to dismiss was untimely. Plaintiff does not explain why summary judgment would be

warranted if defendants' motion were untimely. Presumably, the argument would be that the court should disregard the untimely motion and grant a default judgment against all defendants for failure to respond to defendant's FAC. Second, plaintiff argues that because defendants' motion to dismiss fails to deny any of the allegations in plaintiff's FAC, the court should deem defendants to have admitted all the allegations in plaintiff's FAC, and enter judgment in plaintiff's favor as a matter of law.

i. The Motion to Dismiss Was Not Untimely

Plaintiff argues, without citing any order or authority, that defendant's response to his first amended complaint was due "on or before July 22, 2004," which was ten (10) days after the filing of the amended complaint. Were this true, it would be strange indeed, since the Ninth Circuit has explicitly held that "a motion under Federal Rule of Civil Procedure 12(b) [may be filed] any time before the responsive pleading is filed." Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1474 (9th Cir. 1988) [*10] (emphasis added). In reversing the district court that found a Rule 12(b)(6) motion to be untimely, the Aetna court held that because "[t]he [Rule] 12(b)(6) motion to dismiss was filed . . . before an answer to the complaint," the motion was timely, and the district court had erred in ruling otherwise. Id. Here, the

motion to dismiss was filed before the filing of any answer. Thus, as a matter of law, the motion to dismiss was timely.

ii. It Would Be Improper to Deem Plaintiffs' Allegations Admitted by Defendants

Plaintiff argues that since defendants have not filed an answer, they have not denied any of the allegations in his complaint, and that defendants must therefore be deemed to have admitted all the allegations in plaintiff's FAC. This is not the law. In fact, other district courts in this circuit have denied motions for summary judgment in nearly identical situations. In Batdorf v. Trans Union, a pro se plaintiff moved for summary judgment on three causes of action after the defendant filed a motion to dismiss on the other causes of action in the complaint, contending that the defendant had admitted the allegations of his complaint relating to [*11] the claims he did not move to dismiss by failing to file an answer. 2000 U.S. Dist. LEXIS 6796, at *11-12 (N.D. Cal. May 16, 2000). The district court denied the motion, stating that the filing of a motion to dismiss enlarges the time for a defendant to respond to the entire complaint, including the causes of action it did not move to dismiss. Id. at 12. Likewise, in Terry v. Internal Revenue Service, another district court denied a similar "motion for default judgment or in the alternative motion for

summary judgment" brought by a plaintiff, finding that because the defendants filed a motion to dismiss pursuant to Rule 12(b), they were not yet required to file an answer. 1997 U.S. Dist. LEXIS 17025, at *6-7 (D. Az. Sept. 30, 1997). The reasoning of these cases is persuasive. Therefore, the court follows its sister courts and denies plaintiff's motion for summary judgment.

B. Defendants' Motion to Dismiss

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiff can prove no set of facts which would entitle him to relief. In ruling on such a motion, the court must [*12] assume all of plaintiff's allegations are true and construe the complaint in the light most favorable to plaintiff. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Defendants base their motion on several arguments and authorities, many of which they contend independently warrant dismissal.

i. The Younger Abstention Doctrine Forbids the Court From Interfering in State Administrative Proceedings

Plaintiff seeks, among other things, reinstatement of

his CPA license. The administrative proceeding for seeking reinstatement is, however, judicial in nature. It involves a hearing before a state administrative law judge, and at such hearing, plaintiff is required to show rehabilitation sufficient to warrant reinstatement of his CPA license. Should plaintiff be dissatisfied with the results of these state administrative remedies, he can seek relief in state court by way of a petition for writ of mandate. Cal. Civ. Proc. Code § 1094.5 [*13] .

The nature of the proceeding is important because the Younger abstention doctrine states that except in exceptional and extremely limited circumstances, a federal court must not intervene by way of injunction or declaration in a state criminal proceeding or administrative proceeding that is judicial in nature. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432-34, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982); Younger v. Harris, 401 U.S. 37, 56, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971); cf. Geiger v. Jenkins, 401 U.S. 985, 91 S. Ct. 1236, 28 L. Ed. 2d 525 (1971)(summarily affirming district court which dismissed claims under 42 U.S.C. §§ 1983, 1985, and 1988 to abstain from interfering with medical license revocation proceedings). The policy underlying this doctrine has been described as:

[A] proper respect for state functions, a recognition of

the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions [*14] are left free to perform their separate functions in their separate ways.
Middlesex, 457 U.S. at 431 (citing Younger, 401 U.S. at 44).

Because the proceeding for reinstatement of plaintiff's CPA license is judicial in nature, and generally to be obtained from the state, the Younger abstention doctrine and its underlying policies of respect for state authority over state matters militate against entertaining plaintiff's request for reinstatement of his CPA license. Therefore, the court will abstain from reaching this issue.

ii. Eleventh Amendment Immunity Bars Plaintiff's Federal Claims Against the State of California and the CBA

States and state agencies are immune from suit in federal court by virtue of the Eleventh Amendment to the United States Constitution. Seminole Tribe of Fla v. Florida, 517 U.S. 44, 53, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); Belanger v. Madera Unified School Dist., 963 F.2d 248, 250 (9th Cir. 1992)(holding that Eleventh Amendment immunity extended to school

district as state agency). The type of relief sought is irrelevant, as the Eleventh Amendment does not exist solely to prevent federal court judgments [*15] that must be paid out of a state's treasury, but to prevent the indignity of subjecting a State to the judicial process at the behest of a private individual. Seminole, 517 U.S. at 58. This immunity can be abrogated, but only where Congress has acted with clear and unequivocal intent to abrogate the immunity, and where Congress acted pursuant to a valid exercise of its power. Id. at 55.

There is no "clear and unequivocal" language in 42 U.S.C. §§ 1983, 1985, or 1986 to abrogate Eleventh Amendment immunity. See also Quern v. Jordan, 440 U.S. 332, 341, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (" § 1983 does not abrogate the State's Eleventh Amendment immunity."). Therefore, the State of California and the CBA, as an agency of the State of California, are both immune from suit. See Carberry v. State Bd. of Accountancy, 28 Cal. App. 4th 770, 772, 33 Cal. Rptr. 2d 788 (1994)(defining California Board of Accountancy as "the state agency empowered to license certified public accountants") (emphasis added). Accordingly, all of plaintiff's claims against defendants the State of California and the California [*16] Board of Accountancy are barred by the Eleventh Amendment.

iii. Plaintiff's Federal Claims Against the Attorney General and His Employees are Time-Barred

To the extent that Eleventh Amendment immunity does not bar plaintiff's claims brought against the Attorney General and his employees in their individual capacities, such claims are time-barred. Federal courts turn to state law on personal injury claims for statutes of limitations in actions brought under 42 U.S.C. §§ 1983 and 1985. Burnett v. Grattan, 468 U.S. 42, 48-49, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984); see also Wilson v. Garcia, 471 U.S. 261, 266-67, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985)(applying state personal injury statute of limitations to action filed under § 1983). Prior to 2002, the statute of limitations on personal injury actions in California was one (1) year. Cal. Civ. Proc. Code § 340(c)(2001). Since all of the allegations regarding plaintiff's claims against these defendants under §§ 1983 and 1985 refer to actions taken before 2002, California's previous one-year statute of limitations applies to them. Plaintiff's claims under § 1986 have an explicit [*17] one (1) year statute of limitations. 42 U.S.C. § 1986 ("But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.").

According to plaintiff's complaint, the misrepresentations and misdeeds by defendant Primes

and other members of the Attorney General's office occurred in 1994 and earlier. (Compl. PP 8-12, id. at 19 n.iv). There are no factual allegations implicating anyone from the Attorney General's office after 1994. Nor does plaintiff argue or present any facts to suggest that the statute of limitations was tolled. Further, it appears from plaintiff's complaint that since the stipulation was issued in 1994, plaintiff has been dealing solely with the CBA in his attempts to get his CPA license reinstated. Thus, all of plaintiff's federal claims against defendants Lockyer, Primes, Diedrich, Granen, and Werner are barred by the relevant statutes of limitations, whether such claims are brought against them in their official or individual capacities.

iv. Plaintiff's Claims Against Agents of the CBA and the Attorney General are also Barred by Prosecutorial Immunity

[*18] Although the Eleventh Amendment does not protect the Attorney General, his agents, and the agents of the CBA to the extent they are sued in their individual capacities, prosecutorial immunity does. Kleinman v. Multnomah County, 2004 U.S. Dist. LEXIS 21466, at *16-17 (D. Or. Oct. 15, 2004) (citing Imbler v. Pachtman, 424 U.S. 409, 419, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)). "Absolute immunity extends to agency officials when they preside over hearings,

initiate agency adjudication, or otherwise perform functions analogous to judges and prosecutors." Romano v. Bible, 169 F.3d 1182, 1186 (9th Cir. 1999) (citing Butz v. Economou, 438 U.S. 478, 514-15, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)). Intent and motivation is relevant to qualified immunity, but irrelevant to absolute immunity; absolute immunity defeats a suit regardless of the underlying intent as long as the actions were closely associated with the judicial process. Imbler, 424 U.S. at 419; Romano, 169 F.3d at 1186. "Prosecutorial immunity extends to the process of plea bargaining as an integral part of the judicial process." Briley v. State of California, 564 F.2d 849, 856 (9th Cir. 1977). [*19] Additionally, the Supreme Court looks to the "nature of the function performed, not the identity of the actor who performed it." Romano, 169 F.3d at 1186 (emphasis added); see also Hirsh, 67 F.3d 708, 715(holding that California Attorney General was entitled to absolute immunity for his limited role in State Bar disciplinary system).

The hearings before the CBA and an administrative law judge are, at a minimum, quasi-judicial. The actions taken by the CBA and its agents and employees in revoking plaintiff's license, and later denying his application for reinstatement, were closely associated with this process. "[A]gency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such

acts." Butz, 438 U.S. at 515. Since these defendants were behaving as prosecutors in an adjudicative process, plaintiffs' claims against defendants Sigmann, Newington, and Knapp are barred by prosecutorial immunity.

Further, all of the allegations of misconduct plaintiffs makes against the agents and employees of the Attorney General's office involve actions undertaken [*20] in connection with the prosecution of plaintiff and the eventual revocation of his CPA license. The "stipulation" that plaintiff alleges was fraudulent was essentially a plea bargain. Thus, even if plaintiffs' claims against the Attorney General and his employees were not time-barred, they would be barred by prosecutorial immunity, notwithstanding the capacity in which they were named as defendants. See Briley, 564 F.2d at 856.

v. Plaintiff's Claim Against Administrative Law Judge Smith is Barred by Absolute Judicial Immunity

It is well-established that judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities. Stump v. Sparkman, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986). This doctrine applies to administrative law judges. Butz,

438 U.S. at 513-14. The factual allegations involving defendant Smith concern only his role as a judge in the administrative adjudicative process. Thus, plaintiff's claims against defendant Smith are barred by judicial immunity.

vi. Further Amendments [*21] Would Be Futile

Generally, leave to amend should be granted when a motion to dismiss is granted. Schreiber Dist. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (1986). However, if the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency, the court may dismiss without leave to amend. Id. Here, no other facts that could be alleged consistent with plaintiff's FAC would defeat defendants' multiple immunities and the relevant statutes of limitations. Therefore, the court will dismiss all of plaintiff's federal claims with prejudice.

C. Remaining State-Law Claims

The court has supplemental jurisdiction over plaintiff's state-law claims pursuant to 28 U.S.C. § 1367(a). Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over state-law claims where the court has dismissed all claims over which it has original jurisdiction. Voigt v.

Savell, 70 F.3d 1552, 1565 (9th Cir. 1995). "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors [*22] to be considered under the pendent jurisdiction doctrine -- judicial economy, convenience, fairness, and comity -- will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). The balance of factors generally indicates that a case belongs in state court when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain. Id.

Here, plaintiff's federal claims will all be dismissed prior to trial. Because the court was able to decide plaintiff's federal claims without reaching the issues underlying plaintiff's state-law claims remaining in this case, the court will decline to exercise supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367(c)(3).

IT IS THEREFORE ORDERED that:

(1) plaintiff's motion for summary judgment be, and the same hereby is, DENIED;

(2) defendants' motion to dismiss be, and the same hereby is, GRANTED;

(3) plaintiff's claims under 42 U.S.C. §§ 1983, 1985, and 1986 be, and the same hereby [*23] are, DISMISSED WITH PREJUDICE; and

(4) plaintiff's state-law claims be, and the same hereby are, DISMISSED pursuant to 28 U.S.C. § 1367(c)(3).

DATED: August 5, 2005

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

BERNARD JOSEPH ROSA, JR., Plaintiff - Appellant, v. STATE OF CALIFORNIA, a Government Entity; CALIFORNIA BOARD OF ACCOUNTANCY; CAROL SIGMANN, an individual and in her capacity as agent and employee of the CBA; GREGORY P. NEWINGTON, an individual and in his capacity as agent and employee of the CBA; LAWRENCE KNAPP, an individual and in his capacity as agent and employee of the CBA; EDMUND G. BROWN JR., ** Attorney General of California; JOEL PRIME, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney general; RONALD DEIDRICH, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney; MICHAEL R. GRANEN, an individual and in his capacity as agent and employee of the California Attorney General as a deputy attorney; STEPHEN J. SMITH, Administrative Law Judge, Defendants - Appellees.

** Edmund G. Brown Jr. is substituted for his predecessor, Bill Lockyer, as Attorney General of California, pursuant to Fed. R. App. P. 43(c)(2).

No. 05-16783

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

01/18/2008 29 Filed order (Procter R. HUG, William A. FLETCHER, Richard R. CLIFTON): denying petition. [6383611-1] [05-16783]